Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

JOHN BRENEMAN and WILLIAM D. BRENEMAN,

*Petitioners*,

*v.*

UNITED STATES EX REL.; THE FEDERAL AVIATION ADMINISTRATION; COMMONWEALTH OF MASSACHUSETTS EX. REL.; MASSACHUSETTS AERONAUTICS COMMISSION; 70 ACERS OF LAND A/K/A/ TANNER HILLER AIRPORT,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The First Circuit Court of Appeals affirmed the summary judgment decision of the District Court concluding petitioners quiet title and pendant constitutional and equitable claims were barred by the principles of *res judicata* and sovereign immunity due to the decision of the United States Court of Federal Claims. A petition for a writ of certiorari No. 04-496 from the Federal Circuit has been filed to review the decision of the United States Court of Federal Claims. This petition for a writ of certiorari from the First Circuit seeks review of the court decisions that allow the public the right of free transit across petitioners' property and prevent petitioners from removing illegal buried waste, erecting a boundary fence and quieting title to their property.

Three questions are presented:

1. Does the Fifth Amendment provide protection against Governmental action that prevents a private landowner from removing illegal buried waste and erecting a boundary fence in order to grant the public the right of transit on the surface and at least three feet below the surface of private property.

2. Did the waiver of sovereign immunity in actions to quiet title under 28 U.S.C. § 2409a include the State where the State claims an interest in the same property as claimed by the United States and where the State Constitution prohibits the taking of private property for public use and the State voluntarily participated in the regulatory regime established by Congress.

3. Did Congress in dividing jurisdiction between the Article III district courts and the Article I Federal Court of Claims intend to impair the vitality of the Fifth Amendment by allowing the limited jurisdiction of the Article I court to become *res judicata* over an action to quiet title under 28 U.S.C. § 2409a.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF CONTENTS | iii |
| TABLE OF CITED AUTHORITIES | v |
| TABLE OF APPENDICES | xii |
| OPINIONS BELOW | 1 |
| STATEMENT OF JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE PETITION | 10 |
| I. Does the Fifth Amendment Provide Protection Against Governmental Action That Prevents A Private Landowner From Removing Illegal Buried Waste And Erecting a Boundary Fence in Order to Grant the Public the Right of Transit on the Surface and at Least Three Feet Below the Surface of Private Property. | 11 |

*Contents*

*Page*

II. Did The Waiver Of Sovereign Immunity In Actions To Quiet Title Under 28 U.S.C. § 2409a Include The State Where The State Claims An Interest In The Same Property As Claimed By The United States And Where The State Constitution Prohibits The Taking Of Private Property For Public Use And The State Voluntarily Participated In The Regulatory Regime Established By Congress. ..... 18

III. Congress in Dividing Jurisdiction Between Article III District Courts and the Article I Federal Court of Claims Did Not Intend to Impair The Vitality of the Fifth Amendment By Allowing The Limited Jurisdiction Of The Article I Court To Become *Res Judicata* Over An Action To Quiet Title Under 28 U.S.C. § 2409a. ..... 23

CONCLUSION ..... 30

## TABLE OF CITED AUTHORITIES

*Page*

**Cases**

*Angelle v. State*,
212 La. 1069 (La. 1948) ..... 22

*Block v. North Dakota*,
461 U.S. 273 (1983) ..... *passim*

*Bowen v. Massachusetts*,
487 U.S. 879 (1988) ..... 25, 29

*Brown v. Hotel and Restaurant Employees and Bartenders Int'I Union Local 54*,
468 U.S. 491 (1984) ..... 21

*California v. Arizona*,
440 U.S. 59 (1979) ..... 24, 25

*California v. Deep Sea Research, Inc.*,
523 U.S. 491 (1998) ..... 21

*Cameron v. United States*,
148 U.S. 301 (1892) ..... 12

*Camfield v. United States*,
167 U.S. 518 (1896) ..... 12, 14

*Cereghino v. State*,
230 Or. 439 (Or. 1962) ..... 22

*Chicago v. International College of Surgeons*,
522 U.S. 156 (1997) ..... 24

*Cited Authorities*

*Page*

*City of Burbank v. Lockheed Air Terminal*,
411 U.S. 624 (1973) ..... 20

*Cromwell v. County of Sac.*,
94 U.S. 351 (1876) ..... 26

*Crosby v. National Foreign Trade Council*,
530 U.S. 363 (2000) ..... 21

*Dillard v. Austin Indep. School Dist.*,
806 S.W.2d 589 (Tex. Ct. App. 1991) ..... 22

*Eastern Enterprises v Apfel*,
524 U.S. 498 (1998) ..... 25

*FCC v. Florida Power Corp.*,
480 U.S. 245 (1987) ..... 11, 16

*Kaiser Aetna v. United States*,
444 U.S. 164 (1979) ..... 10, 16

*Kelso, et al. v. City of New London, et al.*,
No. 04-108, ..... 10

*Loretto Teleprompter v. Manhattan CATV Corp.*,
458 U.S. 419 (1982) ..... 16, 17

*Minnesota Co. v. National Co.*,
70 U.S. 332 (1865) ..... 28

*Cited Authorities*

*Page*

*Minnesota v. United States*,
305 U.S. 388 ..... 19

*Montana v. United States*,
440 U.S. 147 (1979) ..... 27

*Morse v. Stocker & Others*,
Allen 150 (Mass. 1861) ..... 13, 23

*Nevada v. United States*,
463 U.S. 110 ..... 28

*New Hampshire v. Maine*, 532 U.S. 742 (2001) ... 26

*Northern Pipeline Co. v. Marathon Pipe Line, Co.*,
458 U.S. 50 (1982) stayed 459 U.S. 813 (1982)
..... 24

*Pennhurst State School & Hosp. v. Halderman (II)*,
465 U.S. 89 (1964) ..... 21

*Pumpelly v. Greenbay and Mississippi Canal Co.*,
80 U.S. 166 (1872) ..... 16

*Rice Hope Plantation v. South Carolina*
*Pub. Serv. Authority*,
216 S.C. 500 (S.C. 1907) ..... 22

*Schumette v. State*,
147 Neb. 193 (Neb. 1946) ..... 22

*Cited Authorities*

*Page*

*State v. O.24148, etc., Acres of Land*,
53 Del. 439, 171 A.2d 228 (Del. 1961) ..... 22

*United States v. Causby*,
328 U.S. 256 (1946) ..... 12

*United States v. City of New Haven*,
496 F.2d 452 (2d Cir. 1974), *cert. denied and app. dism'd*, 419 U.S. 958 (1974) ..... 14

*United States v. Mitchell*,
463 U.S. 206 (1983) ..... 25

*United States v. Pewee Coal Co.*,
341 U.S. 114 (1951) ..... 17

*Verizon Md. Inc. v. Public Serv. Comm'n of MD*,
535 U.S. 635 (2002) ..... 21

*Weber v. Board of Harbor Comm'rs*,
85 U.S. 57 (1873) ..... 20

*YMCA v. United States*,
395 U.S. 85 (1969) ..... 17

*Cited Authorities*

*Page*

**Statutes**

28 U.S.C. § 1254(1) ..... *passim*

28 U.S.C. § 1346 ..... *passim*

28 U.S.C. § 1346(f) ..... *passim*

28 U.S.C. § 1491(a)(1) ..... *passim*

28 U.S.C. § 2409a ..... *passim*

42 U.S.C. § 1983 ..... *passim*

49 U.S.C. § 40102(30) ..... *passim*

49 U.S.C. § 40103(a)(1) and (a)(2) ..... *passim*

49 U.S.C. § 46301(a) ..... *passim*

49 U.S.C. § 46316 ..... *passim*

49 U.S.C. §44718 ..... *passim*

M.G.L. Chapter 90 § 35B ..... *passim*

M.G.L. Chapter 90 § 44 ..... *passim*

14 C.F.R. § 77.1-77.5 ..... *passim*

14 C.F.R. § 77.13(5)(i) ..... *passim*

*Cited Authorities*

*Page*

**Other Authorities**

Airport Design Advisory Circular 150/53001 ..... 2, 15

61st Edition of the New York Sectional Chart ..... 6

Airport Directory of the Airman's Information Manual ..... 4

*Black's Law Dictionary*, 341 (5 ed. 1979) ..... 11

*Black's Law Dictionary*, 893 (8 ed. 2004) ..... 12

R. Frost North of Boston, "Mending Wall" (1914) ... 12

*Powell on Real Property*, Vol. 9 § 68.03[3] p 68-10 ..... 14

*Constitutional Law Principles and Policies*, Chemerinsky Second Edition p. 179 (2002) .... 18

Restatement (Second) of Judgments §§ 11, 26 (1982) ..... 26

D. Sharpiro Civil Procedure: Preclusion in Civil Actions 25, 28-29 (2001) ..... 26-27

*Cited Authorities*

*Page*

**Constitutional Provisions**

U.S. Const. Amendment V..... *passim*

Article 10 of the Constitution of the Commonwealth of Massachusetts ..... 1, 22, 23

## TABLE OF APPENDICES

*Page*

Appendix A — Opinion Of The United States Court Of Appeals For The First Circuit Dated August 25, 2004 ..... 1a

Appendix B — Memorandum Decision Of The United States District Court For The District Of Massachusetts Dated September 23, 2003 ..... 16a

Appendix C — Stipulation Of Dismissal Entered In WCV 1992-2705 Entered On April 2, 2001 .... 24a

Appendix D — Constitutional Provisions And Statutes Involved ..... 26a

## OPINIONS BELOW

The First Circuit Court of Appeals judgment is reported at 381 F.3d 33 (1st Cir. 2003) and is included as Appendix A. The Judgment of the District Court is published at 2003 WL 22203684 (D. Mass 2003) and is reprinted as Appendix B.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on August 25, 2004. This petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment V [1791]

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Commonwealth of Massachusetts Constitution

Article 10 Bill of Rights

> Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty

> and property, according to standing laws . . . no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his consent . . . And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

The quoted portions of Article I and Article III of the U.S. Constitution and the provisions of 49 U.S.C. § 40102(30) "Navigable Airspace," 49 U.S.C. §§ 40103(a)(1) and (a)(2) Sovereignty and Public Right of Transit, 49 U.S.C. § 46301(a) Civil Penalties, 49 U.S.C. § 46316 Criminal Penalty, 49 U.S.C. § 44718 Structures Interfering With Air Commerce, 28 U.S.C. § 2409a Real Property Quiet Title actions, 28 U.S.C. § 1346 United States as defendant, Massachusetts General Laws Chapter 90 § 35B Approach Protection, Massachusetts General Laws Chapter 90 § 44 are lengthy and are therefore set out in Appendix D pursuant to Supreme Court Rule 14.1(f) along with a citation to the Airport Design Advisory Circular 150/5300.

## STATEMENT OF THE CASE

Petitioners stand to lose a portion of their private property to the United States as navigable airspace through which the public has a right of transit. The loss of the right to exclude the public from the petitioners' property includes a boundary fence and land not in dispute between the public use airport and the petitioners.

Petitioners John Breneman and William D. Breneman assert this portion of the surface and at least three feet below the surface of their private real estate has been taken for public use without just compensation in violation of the Fifth Amendment. Alternatively, petitioners claim a portion of their private real estate has been taken by the United States and transferred to an

adjacent public use airport for public use by an act of spoliation in violation of the Fifth Amendment. Spoliation is the use of Governmental power to transfer private property from one private owner to another for the benefit of the public.

The Act of taking or spoliation occurred on January 5, 2001 when the United States issued two Determinations of Hazard pursuant to 49 U.S.C. § 44718. These Determinations of Hazard by the United States are backed by civil and criminal penalties. These civil and criminal penalties have prevented the petitioners from returning their land to its original condition and from removing an estimated 25,000 cubic yards of illegal buried waste on about 5 acres of land and replacing a hill and a boundary fence at the end of their property. The hill and fence were illegally removed and waste buried at the end of petitioners' property by the owners of the adjacent airport without petitioners' knowledge or permission.

The act of taking or spoliation by the United States on January 5, 2001 imposed a navigational servitude on portions of the surface, above the surface and at least three feet below the surface of petitioners' property as "navigable airspace." This "navigable airspace" claimed by the United States for public use allows the free transit of citizens on the surface, above the surface and at least three feet below the surface of petitioners' property under 49 U.S.C. § 40103(a)(2). The Commonwealth of Massachusetts provided its official imprimatur to the determinations of hazard with Massachusetts civil and criminal penalties to deny the replacement of the hill needed to shield the fence.

This is not a case that concerns a subjacent landowner attempting to extend property rights into "navigable airspace" by erecting a building or a previously non existing structure. Rather this case presents a vital constitutional question this Court has never before addressed: whether the United States can extend

its navigable airspace onto and at least three feet below the surface of a landowner's property for a public purpose and thereby prevent a landowner from returning land to its original condition while denying compensation. Alternatively, can the United States classify a portion of the surface and at least three feet below the surface of private property as, "navigable airspace" and transfer it to a public use airport for the benefit of the public without compensation.

Petitioners' property existed for at least 40 years with the hill that shielded a boundary fence between the petitioners' property and the Tanner Hiller Airport. The shielding hill and boundary fence limited the use of the Tanner Hiller Airport to small aircraft and gliders and prevented the acquisition, use and taking of "navigable airspace" on the surface, above the surface as well as *below the surface* of petitioners' property irrespective of the length of the single runway at the airport. It further limited the public use of the airport to small aircraft and gliders. The extension of the runway and the taking of new "navigable airspace" paved the way for the introduction of larger, noisier and heavier aircraft.

The Tanner Hiller Airport is a public use airport listed in the Airport Directory of the current Airman's Information Manual. A public use airport is open to the public and consistent with uniform national standards has its flight path ("airspace needed to ensure safety in takeoff and landing of aircraft") comprehensively regulated as "navigable airspace" under 49 U.S.C. § 40102(30). *See also* 14 C.F.R. § 77.1-77.75.

Petitioners' property is not on airport property, is not an airport and has never been listed as an airport in the Airport Directory of the Airman's Information Manual. Petitioners' property has been in their family since about October, 1933 long before the creation of the Tanner Hiller Airport and the 1958 Federal Aviation Act that redefined "navigable airspace"

as the airspace above the minimum altitudes of flight prescribed by regulation . . . "including the airspace needed to ensure the safety in the takeoff and landing of aircraft." 49 U.S.C. § 40102(30).

At some unknown date prior to August, 1991[1] the Tanner Hiller Airport illegally altered the existing flight path by removing the shielding hill and boundary fence on petitioners' property and extending the runway, without notice to petitioners', the FAA or the Commonwealth of Massachusetts Aeronautics Commission (MAC) in violation of the mandatory notice requirements of 14 C.F.R. § 77.13(5)(i). Large quantities of gravel were removed and sold and petitioners' property was excavated from about 4 feet to 20 feet below the elevation of the runway.[2] An estimated 25,000 cubic yards of illegal solid waste was then buried under petitioners' property and at least 5 acres of petitioners' property were destroyed and destabilized. In the process the federally mandated Runway Primary Surface, Runway Object Free area, Runway Protection Zone and Runway Approach Surfaces were extended onto petitioners' property. The Commonwealth mandated runway approach surfaces are different from and conflict with the federally mandated standards leaving petitioners subject to different state and federal standards both having separate civil and criminal penalties.

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1. An issue of fact was presented in WCV 92-2705 as to the exact date the boundary fence, gravel, trees and hill were removed from petitioners' property and the runway was extended. The case in WCV 92-2705 was for trespass and conversion and not for taking of navigable airspace, as an airport has no power of eminent domain. The exact date of the removal of the boundary fence, gravel, trees and hill remains an issue of fact in the Commonwealth of Massachusetts Appeals Court No. A.C.-2003-P-234 *sub judice*.

2. On land that previously was in all places 4 to 80 feet higher than the elevation of the runway.

About August, 1991 petitioners discovered the damage to their property. Action was instituted in WCV 92-2705 for trespass and conversion. In December, 1997 petitioners discovered and reported a discrepancy in runway length to the FAA. In April, 1998, the FAA received a copy of a letter from the Massachusetts Aeronautics Commission (MAC) advising the Airport Master Record did not correctly note the proper runway length.

For two more years, periodic runway inspections were made and all official publications continued to report the same original runway length and neither the United States nor MAC made an attempt to assert a claim to "navigable airspace" on the surface or below the surface of petitioners' property. Petitioners' relied upon the official publications of the FAA and attributed the fact the original runway length remained the same for more than 2 more years was due to the fact the runway had been illegally extended in violation of the mandatory notice requirements of 14 C.F.R. § 77.13. Petitioners remained confident the United States and MAC would allow petitioners' to return their property to its original condition when the private action between the petitioners, the Tanner Hiller Airport and Amorello Construction Company was completed in WCV 1992-2705. Petitioners relied upon the inaction of MAC and the United States.

On or about May 18, 2000, after obtaining a copy of the 61st Edition of the New York Sectional Chart, petitioners' first noticed the United States intended to take their property for the benefit of the public. On June 14, 2000 petitioners filed mandatory notices of proposed construction and sent copies to MAC seeking to return their land to its "original condition" by removing buried waste, replacing the hill at the end of their property and erecting a boundary fence and prevent the taking of their property by the United States as "navigable airspace."

On September 21, 2000 MAC advised the proposed 10 foot replacement fence was not in an airport approach area as defined by MGL Chapter 90, Section 35B and therefore was not subject to a permit from MAC. The proposed fence was not located in an airport landing area as defined by a different Massachusetts regulatory standard and therefore did not place the public use airport in non-compliance with MAC regulations. The proposed hill was determined to be within an airport approach area and therefore was subject to a permit from MAC under standards different from the federal standards.

Thereafter, in an act of taking or spoliation, the United States without notice or a hearing and upon prompting from the Tanner Hiller Airport, issued a Determination of Hazard in Aeronautical Study No. 00-ANE-0439-OE on January 5, 2001, that petitioners' replacement hill would constitute a hazard to air navigation. The United States, also without notice or a hearing and upon prompting from the Tanner Hiller Airport, issued a Determination of Hazard in Aeronautical Study No. 00-ANE-0438-OE on January 5, 2001[3] that petitioners' placement of a 10-foot boundary fence on their property to separate it from the Tanner Hiller Airport would constitute a 13-foot hazard[4] to air navigation because it was on the Runway Primary Surface of the illegally extended runway.

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3. After previously advising the FAA petitioners did not own the property, the Tanner Hiller Airport dropped its claim of adverse possession one month after the FAA issued its determinations of hazard. *See* Stipulation of Dismissal cover letter and docket entry 24a.

4. The 13-foot hazard to air navigation was arrived at by taking the 10- foot high fence and adding a 3-foot below-the-ground penetration to yield a 13-foot hazard to air navigation, thereby deciding "navigable airspace" extends not only on the surface but also at least 3-feet below the surface of petitioners' property.

Petitioners have sought to have their land returned to them in order to remove the illegal buried waste and return their land to its original condition. Their efforts have been impeded by jurisdictional issues of competing state and federal regulatory standards[5] and arguments of *res judicata* based on cases and decisions of courts lacking jurisdiction or not accepting jurisdiction to decide issues involving "navigable airspace."

Due to jurisdictional limitations mandated by Congress on Article I and Article III courts petitioners were required to divide their cause of action under the Fifth Amendment to conform to the jurisdictional limitations of the District Court and the Court of Federal Claims. These jurisdictional limitations were specified in the complaints filed the same day, December 13, 2002, in the United States District Court for the District of Massachusetts and the United States Court of Federal Claims.

Petitioners' in the District Court sought to quiet title to their property and equitable relief under 28 U.S.C. § 2409a Quiet Title Act, since quieting title required the presence of the Commonwealth of Massachusetts and the Tanner Hiller Airport as necessary parties along with the United States. Only the United States District Court for the District of Massachusetts had original and exclusive subject matter jurisdiction of Quiet Title actions 28 U.S.C. § 1346(f) and personal jurisdiction over the Tanner Hiller Airport, the Commonwealth of Massachusetts and the United States either or all of which claimed or maintained an interest in petitioners' property. Moreover, only the District Court had jurisdiction of the claim for relief under 42 U.S.C. § 1983 and provided a right to a jury trial, which was requested, to apportion liability among the parties for their interference with petitioners' property rights.

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5. These State and federal regulatory schemes both include different civil and criminal penalties for attempting to take back private property that has been identified as "navigable airspace."

The United States Court of Federal Claims lacked jurisdiction over all adverse claimants, lacked jurisdiction over Quiet Title actions under 28 U.S.C. § 2409a and lacked jurisdiction in *rem* and equitable remedies inherent in resolving the issues in the Complaint. The United States District Court for the District of Massachusetts does not have jurisdiction over the inverse condemnation action if the value of the property taken by the United States exceeded $10,000.00. Petitioners were forced to divide their action under the Fifth Amendment to conform to the jurisdictional limitations imposed by Congress in the Tucker Act and Quiet Title Act, imposed by Congress in the waivers of sovereign immunity.

As a result of the above-described conflict, the United States Court of Federal Claims decided it had jurisdiction over the part of the claim pleaded in the Federal Claims Complaint but improperly granted summary judgment to the United States as pointed out in the petition for writ of certiorari in No. 04-496. The First Circuit and the District Court erroneously concluded the decision of the United States Court of Federal Claims decision was *res judicata* for the different claim pleaded in the District Court. The division of an action as mandated by Congress due to the jurisdictional limitations of each of the courts cannot as a matter of law be *res judicata* for the claims in United States District Court since it alone had original exclusive jurisdiction to quiet title under 28 U.S.C. § 2409a and to provide the relief requested in that Complaint.

Despite all actions taken by petitioners to quiet title, issues of title, ownership and control of their property remain unanswered and uncertain. The District Court stated that petitioners "do not have actual possession of the land in controversy — the Airport does." 22a. Notwithstanding this unsupported statement the Airport in the stipulation filed in State

court stated that it did not have adverse possession of petitioners' property. 24a. If the Airport has actual possession of petitioners' property it is the result of Governmental action involving an unconstitutional act of taking or spoliation. Petitioners are entitled to know from the District Court who owns their property as well as its boundaries as the District Court is the *only* court with jurisdiction over this issue under 28 U.S.C. § 2409a when an action of the United States results in a disputed title to real property.

## REASONS FOR GRANTING THE PETITION

Three compelling reasons exist for granting the petition for certiorari in this case.

First, conflict exists among the circuits on the same facts of this case as to the legal effect of the Determinations of Hazard. The D.C. Circuit has held the Determinations of Hazard have "no enforceable legal effect' while the Federal Circuit and First Circuit have given legal effect to the Determinations of Hazard in deciding petitioners lost the "right to exclude" or "lost possession" of their property.

Second, the lower courts ignored Supreme Court precedent in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) and created an exception to the application of the Fifth Amendment in Determination of Hazard cases and applied a regulatory taking analysis instead of a physical taking analysis to support the taking or spoliation. It appears both the United States and the MAC deemed petitioners' property was more valuable to the public as part of the navigable airspace. The petition should therefore be granted for the same reason the petition for writ of certiorari was granted in *Kelso, et al. v. City of New London, et al.*, No. 04-108, namely it represents a case where private property was taken by the United States as "navigable airspace" or taken and transferred to an adjacent property owner for the benefit of the public in an act of spoliation.

Third, the First Circuit and District Court improperly decided the issue of State sovereign immunity and improperly concluded the decision of the United States Court of Federal Claims decision was *res judicata* and failed to properly evaluate the jurisdictional limitations imposed by Congress and the U.S. Constitution on Article I and Article III Courts.

## I. Does the Fifth Amendment Provide Protection Against Governmental Action That Prevents A Private Landowner From Removing Illegal Buried Waste And Erecting a Boundary Fence in Order to Grant the Public the Right of Transit on the Surface and at Least Three Feet Below the Surface of Private Property.

The First Circuit and District Court failed to both quiet title and apply a *per se* takings analysis to a case involving the taking or spoliation of private property. The taking or spoliation of private property included the taking of the ground and at least three feet below the ground and included the taking of the right of the petitioners to remove illegal buried waste and exclude the public by replacing a boundary fence. The physical taking or act of spoliation involved governmental action that require the petitioners to submit to the physical occupation of the land and the very soil itself. "This element of required acquiescence is at the heart of the concept of occupation." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987).

The common law right to the soil included the right to the sky and was based on the Latin maxim *Cujus est solum, ejus est usque ad coelum et ad inferos* or, "To whomsoever the soil belongs, he owns also to the sky and to the depths." *Black's Law Dictionary* 341 (5th ed. 1979). In this case the surface of the land, the soil and below the soil has been deprived the landowners by Governmental action that allows the right of public passage on and at least 3 feet below the surface of the petitioners' property and forces petitioners to suffer buried waste on their property.

*United States v. Causby*, 328 U.S. 256, 261 (1946) recognized that the growth of aviation necessitated some modification of the common law concept. This modification had been codified in the Air Commerce Act of 1926, Ch. 344, § 10, 44 Stat. 574 presently codified at 49 U.S.C. § 40102(30) where Congress declared "navigable airspace" of the United States to include airspace needed to ensure safety in the takeoff and landing of aircraft. Congress in 49 U.S.C. §§ 40103(a)(1) and (a)(2) further declared that "navigable airspace" was within the "exclusive sovereignty" of the United States and that a "citizen of the United States has a public right of transit through navigable airspace." *Causby* at 241, recognized that where this "public highway" interfered with the landowner's use and enjoyment of the land the landowner was entitled to compensation. In this case the interference with the use and enjoyment of the land by the public highway converts at least 5 acres of petitioners' property into public land.

Public land is "[l]ands or interests held by the government without regard to how the government has acquired ownership . . ." *Black's Law Dictionary*, 893 (8th ed. 2004). It has long been unlawful for a landowner to erect a fence enclosing a public highway or public lands. *Camfield v. United States*, 167 U.S. 518 (1896) and *Cameron v. United States*, 148 U.S. 301 (1892).

Petitioners' land could have only become public land by an act of the Government. The Airport stipulated it did not have adverse possession of petitioners' property. Massachusetts has long recognized that private land becomes public land only by an act of Government. A private individual cannot be forbidden to maintain a fence[6] on his own property that injures no one except those who desire to pass over a private road across his

6. The importance of a boundary fence was best explained by Robert Frost's well known adage, "good fences make good neighbors." R. Frost North of Boston, "Mending Wall" (1914).

land. Requiring a private landowner to convert a private road into a public thoroughfare by the act of Government amounts to an unconstitutional taking. *Morse v. Stocker & Others*, 1 Allen 150 (Mass. 1861). As pointed out in *Morse*:

> The power of the legislature over private property, under the constitution, is certainly not absolute, and must be exercised under limitations which have been carefully guarded and defined; and it is one of the gravest duties of this court to determine, in any case presented for its decision, whether those limitations have been exceeded. And it is important, . . . to examine carefully, in the first place, what rights the public already had in the streets or ways to which the statute applies; and then to consider whether any additional rights could be thus acquired or exercised.

*Id.* at 152.

In *Morse* the court correctly noted that without the acquiescence of the Government in which the road was laid out, the way would not have been considered a public way. Until Governmental action the landowner was free to shut up the road and terminate those passing over it since such use constituted a license revocable at the landowner's pleasure. When, however the Government, without title from the landowner, deprives the owner of the right to exclude the public such action is:

> a substantial appropriation of private property to a public use, within the meaning of the tenth article of the bill of rights; and, as the statute makes no provision for any compensation to the owner of the property, it is in direct conflict with that constitutional requirement.

*Morse* at 158.

Then, as now, once the Government claims an interest in land and prevents the private landowner from excluding the public, the only remedy is to seek an action of ejectment or quiet title in a United States "District Court having jurisdiction over the locality where the land [is] enclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity . . ." *Camfield v. United States*, 167 U.S. 518, 522 (1892). Today this procedure is included in 28 U.S.C. §§ 2409a and 1346(f) which provides the district courts with *exclusive original jurisdiction* over actions to quiet title to lands in which the United States claims an interest.

Petitioners' loss of their "right of possession" to their property was the result of Governmental action with the Determinations of Hazard in 2001 that appropriated their property for public use as part of the "navigable airspace" over which the United States has exclusive sovereignty by virtue of 49 U.S.C. § 40103(a)(1). Prior to the January, 2001 Governmental action petitioners and the Airport were free to agree upon and accept the surveyed boundaries as the policy of most courts is to encourage private boundary settlement agreements. *See Powell on Real Property*, Vol. 9 § 68.03[3] pp. 68-10. Petitioners' property rights could not have been privately appropriated since the Airport had stipulated that it did not acquire possession of petitioner's property by adverse possession. This stipulation between private parties was effectively trumped by the United States Determinations of Hazard which identified petitioners' property as "navigable airspace."

As pointed out in *United States v. City of New Haven*, 496 F.2d 452 (2d Cir. 1974), *cert. denied* and *app. dism'd*, 419 U.S. 958 (1974), once petitioners' property was classified as "navigable airspace" no state court decision could infringe upon or change the right of the United States to control and exercise

its sovereignty over this "navigable airspace." Once petitioners' property became part of the "navigable airspace" of the United States, petitioners only option was to seek to clear title to their property under 28 U.S.C. § 2409a. Under 28 U.S.C. § 2409a, actions to quiet title to property in which the United States claims an interest are within the *exclusive original jurisdiction* of the district courts. *See* 28 U.S.C. § 1346(f).

The mandatory legal effect of Determinations of Hazard is demonstrated in this case by analysis of 49 U.S.C. § 44718 and more particularly section 44718(b) under which the Determinations of Hazard were issued and 49 U.S.C. § 46301(a) providing for a civil penalty and 49 U.S.C. § 46316 providing for a criminal penalty. The civil penalties of 49 U.S.C. § 46301(a) exclude sections 44717 and 44719-44723 but do not exclude Section 44718. The criminal penalty in 49 U.S.C. § 46316 excludes only Section 44718(a) but not Section 44718(b) which specifically provided for the issuance of the Determinations of Hazard in this case.

Petitioners, in oral argument before the First Circuit pointed out that violation of the Determinations of Hazard carried civil and criminal penalties under federal law and cited both 49 U.S.C. § 46301 and 49 U.S.C. § 46316 to demonstrate the Determinations of Hazard in this case have an enforceable legal effect. Petitioners repeatedly argued the Determinations of Hazard have an enforceable legal effect and cited the separate civil and criminal penalties under the laws of the Commonwealth of Massachusetts Chapter 90 Section 35B and Section 44.

Airport Design Advisory Circular 150/5300-13 recognizes and supports the "required acquiescence" at the heart of physical occupation by the requirement to remove any replacement fence or hill. Airport Design Advisory Circular 150/5300-13 p. 4

requires removal of obstructions to air navigation that were the subject of the previous Determinations of Hazard by providing:

> (6) *14 CFR Part 77 Obstructions to Air Navigation.*
>
> 'Obstructions to air navigation must be removed unless an FAA aeronautical study, based on proposed operations, determined otherwise.'

In this case the existing Determinations of Hazard based on FAA Aeronautical studies have already determined otherwise. Any replacement fence or hill would now have to be removed. Removal would be required as the United States has never disclaimed its adverse interest in petitioners' property by rescinding or revoking their Determinations of Hazard as contemplated by 28 U.S.C. § 2409a.

The Government effects a physical taking when it *requires* the landowner to submit to the physical occupation of his land. "This element of required acquiescence is at the heart of the concept of occupation." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987). Periodically flooding a landowners property *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871), taking away the right to exclude the public from private property *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) or doing little more than requiring a landowner to suffer the installation of a cable requires compensation under the Takings Clause if the Government is responsible for the compelled physical invasion of the property.

This Court has repeatedly held that as to property reserved for private use, "the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982), quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). When the Government physically takes possession of an interest in

property for some public purpose, it has a categorical duty to compensate the former owner regardless of whether the interest taken constitutes an entire parcel or merely a part thereof *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951). "Government occupation of private property deprives the property owner of this use of the property, and it is this deprivation for which the Constitution requires compensation" *Loretto* at 432 quoting *YMCA v. United States*, 395 U.S. 85, 92 (1969).

Despite clear precedent demonstrating that compelled physical invasion of private property triggers a *per se* physical taking analysis, the First Circuit's affirmance of the District Court improperly accepted the regulatory taking analysis of the Court of Federal Claims. Moreover, both the First Circuit and the District Court improperly construed the Eleventh Amendment and improperly relied upon the Federal Claims decision as being *res judicata* on all issues raised in petitioners Complaint including quiet title under 28 U.S.C. § 2409a which was beyond the jurisdiction of the Court of Federal Claims.

Petitioners' loss of the "right to exclude," "right of possession" and the right of exclusive use of their property to the public warrant serious consideration under the Fifth Amendment due to available civil and criminal sanctions, both state and federal. The taking of private land by the United States' imposition of a navigational servitude is complete and unless rectified by the Court is inconsistent with the protections afforded landowners under the Fifth Amendment.

## II. Did The Waiver Of Sovereign Immunity In Actions To Quiet Title Under 28 U.S.C. § 2409a Include The State Where The State Claims An Interest In The Same Property As Claimed By The United States And Where The State Constitution Prohibits The Taking Of Private Property For Public Use And The State Voluntarily Participated In The Regulatory Regime Established By Congress.

It would appear to be axiomatic that a State is not free to assert a constitutional right to do a constitutional wrong. The purpose of State sovereign immunity is to shield State governments against private actions while defining the relationship between the federal and state governments. In defining these relationships, State governments must be in compliance with the U.S. Constitution and federal law under the Supremacy Clause. While some commentators have labeled Eleventh Amendment decisions as a "tortuous line of Supreme Court cases" or "little more than a hodgepodge of confusing and intellectually indefensible judge made law" the principle of Eleventh Amendment sovereign immunity is to protect state autonomy while ensuing compliance with federal law. See *Constitutional Law Principles and Policies*, Chemerinsky Second Edition p. 179 (2002) and law review articles cited therein. The First Circuit and District Court improperly concluded the petitioners' action under 28 U.S.C. § 2409a was barred by the Eleventh Amendment.

Congress intended 28 U.S.C. § 2409a to provide the, "exclusive means by which adverse claimants could challenge the United States' title to [or interest in] real property." *Block v. North Dakota*, 461 U.S. 273, 286 (1983). 28 U.S.C. § 2409a is a waiver of sovereign immunity by the United States and Congress intended to include the States in the waiver so that QTA actions included all persons whether they be States, private citizens or private or public corporations.

In *Block v. North Dakota* the State argued that the statute of limitations in 28 U.S.C. § 2409a was not binding upon the State since it waived only federal sovereign immunity and not State sovereign immunity. In deciding the waiver of federal sovereign immunity included the State in judicial challenges to the title to real property the Court stated:

> In fashioning sovereign – immunity waiver legislation, Congress is certainly free to exempt the States from a statute of limitations or any other condition of the waiver. But there is no merit to North Dakota's assertion that a condition on a congressional waiver of *federal* sovereign immunity should be regarded as inapplicable to States in absence of express intent to the contrary. This Court has never sanctioned such a rule. . . . And in *Minnesota v. United States*, 305 U.S., at 388 – 389, where the United States had waived its immunity on the condition that any suit against it had to be brought in a federal court, we concluded without hesitation that plaintiff State's suit should have been dismissed for lack of jurisdiction, because it had been filed in state court, even though the federal – court condition did not expressly apply to States. Thus neither Congress nor the decisions of this Court have suggested that the States are presumed exempt from satisfying the conditions placed by Congress on its immunity waivers; and, in light of our Constitution, which makes federal law ultimately supreme, these holdings should not have been surprising.

461 U.S. at 288-89 (emphasis supplied).

Congress in passing 28 U.S.C. § 2409a recognized the necessity of protecting national public interests. National public interest includes uniform national standards for public use

airports. Therefore, suit by a private individual or a State against the United States affects the congressionally recognized public interest. Congress had no intention of exempting the State from compliance with 28 U.S.C. § 2409a when the State and Federal government take title or claim an interest in the same property adverse to the property rights of a private landowner. "That section [§ 2409a] must be applied to the States because they are necessarily included by the nature of the mischiefs to be remedied." *Block v. North Dakota*, 461 U.S. at 290 quoting *Weber v. Board of Harbor Comm'rs*, 85 U.S. 57, 70 (1873).

A Quiet Title action for the adjudication of who owns the surface and three feet below the surface of petitioners' land is exclusively and uniquely within the jurisdiction of the district court as mandated by Congress under 28 U.S.C. § 2409a. Only the district court as a court of equity can acquire jurisdiction of all the rights involved and also of all the owners of those rights, and thus settle and permanently adjudicate in a single proceeding all the rights, or claims to rights, of all the claimants to the common land that has been classified as "navigable airspace" over which the United States has exclusive sovereignty under 49 U.S.C. § 40103(a)(1). The First Circuit and District Court failed to quiet title to petitioners' property as title to the disputed property remains even more complicated in view of the District Court's statement the Airport is in possession of petitioners' property in spite of the stipulation by the Airport in State court that it did not have adverse possession of petitioners' property.

In such cases where the requirement exists for a uniform national standard the Court has applied the Supremacy Clause to preempt State and local interests. *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973). Petitioners' complaint asserts a straightforward claim of preemption actionable under the Supremacy Clause of the United States Constitution,

U.S. Const., art. VI, cl. 2. This Court has never required that such preemption claims be expressly authorized by an act of Congress. Rather, preemption claims are actionable directly under the Supremacy Clause and do not require a separate statutory cause of action under the federal law at issue. *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 387-88 (2000); *Brown v. Hotel and Restaurant Employees and Bartenders Int'I Union Local 54*, 468 U.S. 491, 501-02 (1984). Eleventh Amendment sovereign immunity also does not divest the federal courts of exclusive jurisdiction where federal, State and private rights are intertwined. *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998). The reasoning in *California v. Deep Sea Research* is equally applicable to the present case.

A quiet title action seeking resolution of the conflicting federal, state and private claims to "navigable airspace" which includes the surface and below the surface of petitioners' property is as important as the federal, state and private claims were to the federal property on board the *S.S. Brother Johnathan*. The United States is a party to this action and like *California v. Deep Sea Research* the Commonwealth of Massachusetts has posited an adverse claim to a unified *res* namely, "navigable airspace." This "navigable airspace" like the property in the *S.S. Brother Johnathan* constitutes a *unified res* that is not within the State's possession. *California v. Deep Sea Research* at 495. See also *Pennhurst State School & Hosp. v. Halderman (II)*, 465 U.S. 89, 105 (1964) (where the court recognized the need to promote the supremacy of federal law must be accommodated within the Constitutional immunity of the State).

The sovereign immunity issue in this case also squarely presents the question of whether a State can use sovereign immunity to interfere with federal property and federal law. As pointed out in *Verizon Md. Inc. v. Public Serv. Comm'n of MD*, 535 U.S. 635, 645 (2002) such interference risks the waiver of sovereign immunity.

The Commonwealth in this case not only voluntarily participated but appears to have been directly responsible for monitoring and measuring the runway at the Airport as agent and as copartner with the United States in the taking or spoliation of petitioners' property. These actions by the Commonwealth coupled with the Massachusetts Constitutional prohibitions against taking private property constitute a waiver for the Taking or spoliation of petitioners' property. Article 20 of the Constitution of the Commonwealth provides for the payment of just compensation upon taking of private property for a public use by providing:

> . . . no part of the property of any individual can, with justice, be taken from him, or applied to public uses without his own consent . . . And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

Such constitutional provisions have been held to be self-executing waivers of State sovereign immunity. *Cereghino v. State*, 230 Or. 439 (Or. 1962); *Angelle v. State*, 212 La. 1069 (La. 1948); *Schumette v. State*, 147 Neb. 193 (Neb. 1946); *Rice Hope Plantation v. South Carolina Pub. Serv. Authority*, 216 S.C. 500 (S.C. 1907) and *Dillard v. Austin Indep. School Dist.*, 806 S.W.2d 589 (Tex. Ct. App. 1991). *See also State v. O.24148, etc., Acres of Land*, 53 Del. 439, 171 A.2d 228, 231 (Del. 1961) where the court stated:

> It seems well settled that such constitutional provisions are self-executing waivers on the part of the State of its sovereign immunity. Consequently, where there is a taking of property for public use without a condemnation proceeding, the filing of a separate action for damages against the State by the landowner as a matter of law has been consented to

> by the State. This is a common – law remedy and depends in no wise upon the institution by the State of condemnation proceedings. (Citations omitted).

It would appear a similar waiver would be consistent with *Morse v. Stocker & Others*, 1 Allen 150 (Mass. 1861) in which the court observed:

> We can see in all this nothing but a substantial appropriation of private property to a public use, within the meaning of the tenth article of the bill of rights; and, as the statute makes no provision for any compensation to the owner of the property, it is in direct conflict with that constitutional requirement.

*Id.* at 158.

In this case the State's constitutional waiver was incorporated by Congress in 28 U.S.C. § 2409a which made the Quiet Title Act the exclusive means by which adverse claimants could challenge United States' title and interest in real property. This waiver of sovereign immunity was *per force* intended to include the States if the State also made claim to the same property.

## III. Congress in Dividing Jurisdiction Between Article III District Courts and the Article I Federal Court of Claims Did Not Intend to Impair The Vitality of the Fifth Amendment By Allowing The Limited Jurisdiction Of The Article I Court To Become *Res Judicata* Over An Action To Quiet Title Under 28 U.S.C. § 2409a.

The major problem with the First Circuit decision and the District Court decision is that it gave *res judicata* effect to an Article I court decision not having subject matter jurisdiction over the claims presented in district court. The District Court

for the District of Massachusetts is an Article III court to which Congress gave exclusive original jurisdiction over actions to quiet title under 28 U.S.C. § 2409a and 28 U.S.C. § 1346(f). *See California v. Arizona*, 440 U.S. 59 (1979). In *California* the Supreme Court noted Congress intended to confine jurisdiction to the federal courts when an action was required to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

The United States Court of Federal Claims is an Article I court which is akin to an administrative agency or legislative court with its jurisdiction limited by a particular type of case for which Congress created the Article I court. Congress created the Federal Court of Claims to decide claims for money damages against the United States. In creating an Article I court Congress cannot give it the same jurisdiction as an Article III court, otherwise the constitutional distinction between an Article I court and the concept of an Article III protected court would have no meaning. *Northern Pipeline Co. v. Marathon Pipe Line, Co.*, 458 U.S. 50 (1982) stayed 459 U.S. 813 (1982) (violation of Article III for non Article III judges to have jurisdiction granted by § 241(a) of the Bankruptcy Act of 1978).

Congress has the power to promulgate rules that effect federal court jurisdiction. *Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). The jurisdictional limitations imposed on federal court jurisdiction must be observed by the courts and litigants alike. The petitioners were required by a Congressional jurisdictional mandate to divide their claim along the jurisdictional lines imposed by Congress for Article I and Article III courts.

Congress did not assign equitable, common law Fourteenth Amendment, Fifth Amendment Due Process relief, claims under 42 U.S.C. § 1983 and quiet title claims to the Court of Federal

Claims. The Court of Federal Claims does not have common law jurisdiction over issues of title to property rights and equitable issues appurtenant thereto as pled in the District Court complaint.

Congress in the Tucker Act 28 U.S.C. § 1491(a)(1) gave the Court of Federal Claims exclusive jurisdiction over money claims in excess of $10,000 against the United States. The Tucker Act constituted a limited waiver of sovereign immunity and vested jurisdiction for money damages in the Court of Federal Claims. The Tucker Act did not waive sovereign immunity for quiet title actions, invalidation actions and actions requiring equitable remedies. *See Eastern Enterprises v Apfel*, 524 U.S. 498, 520 (1998); *United States v. Mitchell*, 463 U.S. 206, 216 (1983) and *Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988). Sovereign immunity for Quiet Title actions was separately waived in 28 U.S.C. § 2409a. *See California v. Arizona*, 440 U.S. 59, 61-62 (1979) and *Block v. North Dakota*, 461 U.S. 273, 275-76, (1983). Exclusive original jurisdiction for Quiet Title actions is in the United States District Court pursuant to 28 U.S.C. § 1346(f).

The unsettled relationship between the various Circuit courts as to the division of a cause of action between money damages and equitable relief under the Taking Clause is outlined in *Eastern Enterprises v Apfel*, 524 U.S. 498, 520-22 (1998). The unsettled relationship is central to this case as 28 U.S.C. § 2409a constituted a waiver of sovereign immunity and jurisdictionally mandated a separate action to quiet title in the District Court 28 U.S.C. § 1346(f). Due to the jurisdictional limitations placed on Article I and Article III courts by Congress and the Constitution and the different waivers of sovereign immunity under 28 U.S.C. § 1491(a)(1) under the Tucker Act and 28 U.S.C. § 2409a under the Quiet Title Act the decision of

the Court of Federal Claims could not be *res judicata* on the quiet title claim under 28 U.S.C. § 2409a and the other claimed relief, even if the Court of Federal Claims decision were correct and not before this court in Docket No. 04-0496.

The doctrine of *res judicata* or claim preclusion generally requires a party to bring all grounds for recovery arising from a single transaction or series of transactions in a single lawsuit. This rule of claim preclusion as well as collateral estoppel does not apply where the initial forum does not have the power to award the full measure of relief due to jurisdictional limitations of the court. *See Cromwell v. County of Sac.*, 94 U.S. 351 (1876) and *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

In the present case Congress mandated the division of petitioners cause of action along the jurisdictional lines of the Article I United States Court of Federal Claims and Article III United States District Court for the District of Massachusetts. Petitioners' complaints in each court cited the jurisdictional limitations of the other court as well as the fact both actions were being filed the same day due to the jurisdictional limitations of each court mandated by Congress. Notwithstanding petitioners' efforts to clearly delineate the jurisdictional limitations of each court the First Circuit and the District Court gave *res judicata* effect to the judgment of the United States Court of Federal Claims for claims that were beyond the jurisdiction of the Article I court.

*Res judicata* and collateral estoppel doctrines require the initial forum have the power to award the full measure of relief sought in the later litigation. See Restatement (Second) of Judgments §§ 11, 26 (1982) and D. Sharpiro Civil Procedure:

Preclusion in Civil Actions 25, 28-29 (2001)[7]. As stated in the Restatement (Second):

> The general rule [against relitigation of a claim] is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a litigant's presenting to the court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first. *Restatement* § 26(1)(c) cmt. c.

In cases such as the present where a party is precluded from litigating issues due to formal jurisdictional or sovereign immunity barriers imposed by Congress a subsequent action will not be barred by *res judicata* even where it arises from the same factual circumstances as the other action. Due to the jurisdictional limitations on the relief available in the United States Court of Federal Claims, that decision, even if correct, could not have claim preclusive effect in district court. *See Montana v. United States*, 440 U.S. 147, 153-54 (1979).

The First Circuit and District Court both erred in deciding the Court of Federal Claims decision was *res judicata* in the District Court Quiet Title action under 28 U.S.C. § 2409a as the claims were beyond the subject matter jurisdiction of the Article

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7. Professor Shapiro touches upon the special problems embedded in the doctrine of sovereign immunity and Congressional legislation limiting the power of the court to certain matters and cites the "court's obligation to recognize *sua sponte* a potential lack of competence over subject matter.

I court. The Court of Federal Claims did not have jurisdiction over the parties, issues or subject matter of the district court action due to the jurisdictional limitations mandated by Congress. The same day filed actions did not involve the same claim and did not involve the same parties. Only the District Court had subject matter and personal jurisdiction over the Commonwealth of Massachusetts and the Tanner Hiller Airport which were necessary parties in the QTA since each appear to have diverse claims to petitioners' property or the navigable airspace of the United States.

The First Circuit and District Court's reliance upon *res judicata* to deny petitioners' claim to quiet title has done more to cloud title to petitioners' land than it has to quiet title as it is in conflict with the stipulation filed in WCV 1992-2705 and the decision of the Court of Appeals For the District of Columbia Circuit for if the Determinations of Hazard indeed have no enforceable legal effect, they could not have changed possession to petitioners' property. More than a century ago this Court explained that:

> Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. . . . [W]here courts vacillate and overrule their own decisions . . . affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.

*Nevada v. United States*, 463 U.S. 110, 129 n.10 quoting *Minnesota Co. v. National Co.*, 70 U.S. 332 (1865).

# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED AUGUST 25, 2004**

**UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

No. 03-2616

JOHN BRENEMAN and WILLIAM D. BRENEMAN,

Plaintiffs, Appellants,

v.

UNITED STATES ex. rel. THE FEDERAL AVIATION ADMINISTRATION; COMMONWEALTH OF MASSACHUSETTS ex. rel. MASSACHUSETTS AERONAUTICS COMMISSION; 70 ACRES OF LAND A/K/A TANNER HILLER AIRPORT,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Rya W. Zobel, *U.S. District Judge*]

Before

Seyla, *Circuit Judge,*

Cyr, *Senior Circuit Judge,*

and Lipez *Circuit Judge.*

*Appendix A*

**LIPEZ, Circuit Judge.**

In the continuation of a long legal battle, plaintiff landowners brought suit in December 2002 against the Massachusetts Aeronautics Commission (MAC), the Federal Aviation Administration (FAA) and Tanner Hiller Airport, a privately-owned facility, claiming that various actions taken by these entities infringed upon the landowners' property rights. The district court granted the motions to dismiss of the three defendants, and dismissed the complaint with prejudice. Concluding that the plaintiffs' claims were barred by principles of res judicata and sovereign immunity, we affirm. We also grant the Airport's motion for fees and costs as a sanction for the plaintiffs' frivolous appeal of the decision in favor of the Airport.

## I.

In the late 1980s, the Airport hired a contractor to extend its runway closer to the boundary of the Brenemans' property.[1] As part of that project; the contractor removed a fence, a hill, and other obstacles that were on the Brenemans' side of the property line. The Brenemans allege that they discovered the alterations in 1991 and brought suit in the Massachusetts Superior Court in September 1992 for, *inter alia,* trespass, conversion, and to quiet title against the Airport.[2]

1. Although the property owned by the Brenemans is largely undeveloped, there is a residence on it.

2. The Airport filed a counterclaim in this action, claiming that it had acquired the property through adverse possession. The court dismissed that claim without prejudice in response to a stipulation from the parties that was docketed on April 2, 2001.

*Appendix A*

*See Breneman v. Wolfson,* No. WCV922705, 1999 WL 1203920 (Mass.Super.Ct. Oct. 21, 1999).[3] They added the gravel company as a defendant in April 1997. The court awarded summary judgment to the gravel company on statute of limitations and repose grounds in *Breneman v. Tanner,* No. 922705, 1999 WL 1336436 (Mass.Super.Ct. Feb. 1, 1999), and granted summary judgment to the Airport on the same grounds a few months later in *Breneman v. Wolfson,* No. WCV922705, 1999 WL 1203920 (Mass.Super.Ct. Oct. 21, 1999).

In late 1997, while their superior court case was pending, the plaintiffs wrote a letter to the FAA, complaining that they learned during discovery that the Airport's runway was longer than the length listed in the New York Section Chart for Pilots, the FAA's official directory of airports in that region. The agency apologized for the error and published a corrected version of the sectional chart on May 18, 2000.

When the Brenemans learned of that correction, they filed notices with the FAA and the MAC, proposing to construct a hill and a boundary fence to replace the ones that the contractors had removed. The FAA responded with two hazard studies on January 5, 2001, concluding that both proposed construction projects would create potential dangers to air traffic at the Airport. The hazard studies determined that the proposed ten foot high fence would exceed the "primary surface," an imaginary plane extending two hundred feet from the end of the runway that provides a safety buffer for aircraft, by thirteen feet, and that the proposed hill would

3. We have provided a chronology of the various legal proceedings in the appendix to this opinion.

exceed the "approach surface," an imaginary plane extending outward and upward from the end of the runway, by sixty-two feet.

After reviewing the FAA studies and providing the Brenemans with a public hearing, the MAC denied the Brenemans a permit to build the hill on August 15, 2001. The Brenemans challenged the MAC's denial of their permit in Worcester Superior Court, alleging that the commission violated Massachusetts law and that it took *36 their property without due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 10 of the Massachusetts Declaration of Rights. The court denied all of the Brenemans' claims. *See Breneman v. Massachusetts Aeronautics Comm'n,* No. 0101893B, 2004 WL 856640, (Mass.Super.Ct. Mar. 15, 2004).

On April 9, 2001, while their permit application with MAC was still pending, the Brenemans filed appeals of the FAA's hazard studies in the United States Court of Appeals for the D.C. Circuit. That court issued its unpublished decision on February 26, 2002, after the MAC denied the construction permit. Concluding that the FAA's fence study was purely advisory in nature and that the plaintiffs had not suffered any actual harm from its publication, the court held that the Brenemans lacked standing to challenge that hazard determination. *Breneman v. FAA,* No. 01-1165, 2002 WL 449015 at *7-*8 (D.C.Cir. Feb.26, 2002) (per curiam). Observing that MAC's denial of the Brenemans' hill permit was based in part on the FAA study, the court concluded that they had demonstrated a sufficiently concrete harm to establish standing with regard to the FAA hill study. However,

the court concluded that the study was committed to agency discretion and thus was unreviewable under the Administrative Procedure Act ("A.P.A."). *Id.* The court also dismissed their "constitutional challenges" to the FAA's hill determination without identifying what those challenges were. *Id.* at *2. After reviewing the record from those proceedings, we conclude that the court was referring to the Brenemans' claim that the FAA should have granted them notice and an opportunity to comment while it was conducting the study.[4]

On December 13, 2002, the Brenemans continued their legal campaign by filing two more suits, this time in the United States Court of Federal Claims and the United States District Court for the District of Massachusetts. Their complaint in the Court of Federal Claims alleged a physical and regulatory taking against the FAA.[5] The physical taking claim was based on 49 U.S.C. § 40102(a)(32), which defines "navigable airspace" as including "airspace needed to ensure safety in takeoff and landing of aircraft." The Brenemans alleged that the FAA's correction of the runway length in the updated

4. The court noted that the Brenemans violated the D.C. Circuit's "chutzpah doctrine" by challenging the propriety of the hazard study "when they conceded at oral argument that they *intend* to build the hill in part to impede air traffic at the Airport." *Id.* at *1.

5. The Brenemans filed their Court of Federal Claims action a few hours before they filed their Feoeral District Court complaint in an effort to maintain the Court of Federal Claims's subject matter jurisdiction over the case. *See* 28 U.S.C. § 1500 ("The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States. . . .").

sectional chart constituted a tacit approval of the runway extension. Observing that this extension forced the runway primary surface beyond the property line, the Brenemans alleged that the FAA took title to their airspace and the first three feet of soil lying within two hundred feet of the end of the runway and converted it into navigable airspace. They based their regulatory taking claim on the FAA's determination that the construction of the hill and the fence would create hazards for air travel.

The Court of Federal Claims rejected their physical taking claim, concluding that it could not find a precedent to support the proposition that "mere creation or recognition of navigable airspace" can result in a taking. It denied their regulatory taking claim because the hazard reports were only advisory studies that had no enforceable legal effect. *See Breneman v. United States,* 57 Fed. Cl. 571 (2003), *aff'd,* No. 03-5156, 2004 WL 1153329 (Fed.Cir. May 10, 2004).

As stated, the Brenemans also filed a seven count federal complaint in the District of Massachusetts against the MAC, the FAA, and the Airport on the same day that they filed their complaint in the Court of Federal Claims. The complaint repeated the physical and regulatory takings claims[6] as well as the due process claim that it had previously litigated in the D.C. Circuit. It also included claims that 1) the hazard studies were substantively infirm; 2) the MAC and the Airport

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6. The count marked as "Inverse Condemnation" was actually a sprawling fifteen page, forty paragraph litany of grievances, including both physical and regulatory takings, lodged against the parties. The general thrust of that count seems to concern the inverse condemnation/regulatory taking.

conspired to violate the Brenemans' constitutional rights by concealing the date on which the Airport extended its runway; and 3) all of the parties "appropriated and confused" the Brenemans' property rights. There was also a claim to quiet title against the FAA.

In dismissing the claims against the Airport, the district court summarily rejected the inverse condemnation, section 1983, and "use of property" claims by noting that these claims may not be brought against private parties. It interpreted the Brenemans' allegations that the actions of the defendants "constitute an appropriation and confusion of plaintiffs' property with the Tanner Hiller Airport property" as possibly raising a trespass claim and dismissed that claim on statute of limitations grounds. Finally, it concluded that there was no support for the allegation that the MAC and the Airport conspired to violate the Brenemans' rights. The district court dismissed the allegations against the FAA and the MAC on res judicata and Eleventh Amendment grounds respectively. *Breneman v. United States ex rel. the Fed. Aviation Admin.*, No. Civ. A02-12400RWZ, 2003 WL 22203684 (D.Mass. Sept.23, 2003).

The Brenemans raise three claims on appeal. First, they claim that the district court improperly dismissed their quiet title claim against the FAA based on its erroneous conclusion that the Airport held actual possession of the disputed property.[7] Second, they claim that the court applied the wrong standard when it dismissed their takings claims against the FAA and

7. The district court apparently viewed the quiet title claim directed at the FAA as a claim directed at the Airport. This error does not affect our disposition of this appeal.

the MAC. Third, they argue that the court failed to apply a sufficiently rigorous test to the MAC's claim of Eleventh Amendment immunity. They do not challenge the district court's dismissal of their claims against the Airport.

## II.

### A. The Claims against the FAA

The Brenemans ignore the grounds upon which the district court dismissed their claims against the FAA. Rather than address the res judicata effects of the Court of Federal Claims decision, which formed the basis of the district court's opinion, they raise irrelevant arguments regarding the substantive standards that the court should have applied to their takings and quiet title claims against the FAA. Concluding that the district court's ruling regarding the res judicata effects of the Court of Federal Claims decision was correct, we ignore the Brenemans' extraneous arguments.

"Under the federal law of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were raised or could have been raised in that action." *Apparel Art Int'l, Inc. v. Amertex Enters. Ltd.*, 48 F.3d 576, 583 (1st Cir.1995) (footnote omitted). Res judicata "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and . . . encourage[s] reliance on adjudication." *Allen v. McCurry,* 449 U.S. 90, 94 (1980). The elements of a res judicata claim under federal law are: "(1) a final judgment on the merits in an earlier proceeding, (2) sufficient identicality between the causes of action asserted in the earlier

and later suits, and (3) sufficient identicality between the parties in the two actions." *Banco Santander de P.R. v. Lopez-Stubbe (In re Colonial Mortgage Bankers Corp.),* 324 F.3d 12, 16 (1st Cir.2003). Recognizing that the judgment in the Court of Federal Claims was final and that the FAA and the Brenemans were both parties to the proceedings in the Court of Federal Claims and in the Federal District Court, we can quickly dispose of the first and third prongs. We apply a "transactional approach" to the second prong of this test: "The necessary identity will be found to exist if both sets of claims—those asserted in the earlier action and those asserted in the subsequent action—derive from a common nucleus of operative facts." *Gonzalez v. Banco Cent. Corp.,* 27 F.3d 751, 755 (1st Cir.1994) (citation omitted).

We have no difficulty concluding that the Brenemans' claims are barred by the judgment in the Court of Federal Claims. The complaints in both proceedings were based upon the FAA's correction of the sectional chart and its publication of the two hazard studies; therefore, they both originated from a "common nucleus of operative facts." Indeed, it appears that the Brenemans essentially filed identical takings claims in both proceedings, and their quiet title claim seems to be a duplicate of the takings claims filed under a different heading.[8] Moreover, even if the Brenemans did not raise the

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8. The paragraph in the district court complaint that was most relevant to the quiet title action alleged that the United States claimed the "right to control and regulate portions of the surface, above the surface and below the surface of plaintiffs' property, which interferes with plaintiffs' right to use, possess, dispose and enjoy their property as well as the requirements of [a Massachusetts statute] that plaintiffs

(Cont'd)

exact same claims in the Court of Federal Claims, we conclude that they could have litigated all of their claims against the FAA in the Court of Federal Claims. Without belaboring the analysis, we agree with the district court's admonition that "Plaintiffs cannot continue to file lawsuits until they obtain the result they seek." *Breneman,* 2003 WL 22203684, at *3.

**B. The Claims Against the MAC**

The Brenemans complain that the district court improperly dismissed their complaint against the MAC on Eleventh Amendment grounds without conducting a sufficiently detailed analysis of whether the commission is an "arm of the state." We conclude that the district court had a sufficient basis for concluding that the MAC was entitled to immunity.

We often employ a two-step test to determine if an entity is an "arm of the state." *Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico and Caribbean Cardiovascular Ctr. Corp.,* 322 F.3d 56, 65 (1st Cir.2003). In the first step, we look at structural factors to determine whether "the state

(Cont'd)

return their property to its 'original condition.'" The complaint also alleged that the FAA and MAC studies and orders "have created a cloud on the title to plaintiffs' property by preventing plaintiffs from removing buried waste, restoring their land to its 'original condition.'" In a separate paragraph, they claim that the agencies "in regulating plaintiffs' property as an Airport have placed a cloud on plaintiffs' title to their property by dedicating to the public on behalf of the Tanner Hiller Airport rights to control use of the plaintiffs' land on the surface, above the surface and below the surface of plaintiffs' property."

clearly structured the entity to share its sovereignty." *Id.* at 68. However, "[i]f the factors assessed in analyzing the structure point in different directions, then the dispositive question concerns the risk that the damages will be paid from the public treasury. . . . This analysis focuses on whether the state has legally or practically obligated itself to pay the entity's indebtedness." *Id.*

We have no difficulty concluding that the Commonwealth structured the MAC to share its sovereignty. As the district court noted, "[i]n their Complaint, plaintiffs state that defendant CMAC 'is an administrative agency of the Commonwealth of Massachusetts and acts for the Commonwealth of Massachusetts.'" *Breneman,* 2003 WL 22203684, at *4. Furthermore, according to the affidavit filed by Wayne C. Kerchner, MAC's Chief Legal Counsel, the commission is an agency within the Executive Office of Transportation and Construction, its operating budget is subject to appropriation by the General Court (the state legislature) with the approval of the governor, and its hearings and enforcement proceedings are subject to the State Administrative Procedure Act. Finally, according to Massachusetts statutory law, the governor appoints all of the MAC commissioners, and the commission has general police powers to regulate aeronautics through rules and regulations that have the force of law. *See* Mass. Gen. Laws ch. 90, § 39. Concluding that the MAC is entitled to Eleventh Amendment immunity, we affirm the district court's dismissal of the Brenemans' claims.

**C. The Airport's Motion for Costs**

Shortly after oral argument, the Airport filed a motion seeking $3,865.22 in attorney's fees and costs as a sanction for the Brenemans' appeal, and explaining its grievance:

> [I]t is clear from Breneman's [sic] Appellate Brief that the issues raised in this Appeal were directed to the other Appellees and not to the Airport. The Airport raised this in its Brief and at oral argument. As such the Breneman's Appeal as it relates to the Airport is insubstantial and not reasonably calculated to result in a change in the judgment as to the Airport.

In a subsequent response, without citing any authority, the Brenemans argued that the appellees cannot move for sanctions under Fed. R.App. P. 38 until a court has declared that their appeal was frivolous.

There is no validity to the Brenemans' claim. Rule 38 states: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion *or* notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." (emphasis added). There are two requirements here: 1) a court must determine that an appeal was frivolous and 2) the appellant must be given notice and an opportunity to respond before the imposition of sanctions. Neither the text of the rule nor our case law requires a court to determine that an appeal was frivolous before an appellee can move for sanctions. However, the appellant must have notice of the request for

sanctions and an opportunity to respond to it before the court imposes sanctions.

The Rules Advisory Committee added the notice and comment requirement to the rule in 1994 in response to the Supreme Court's admonition that sanctions "should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Roadway Express., Inc. v. Piper,* 447 U.S. 752, 767 (1980). *See* Fed. R.App. P. 38 advisory committee's notes (1994). With regard to the first form of notice, a motion from one of the parties, the Committee explained:

> A separately filed motion requesting sanctions constitutes notice. A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient.

*Id.* The Airport filed such a motion, and the Brenemans filed a detailed response to it. They have been afforded due process. We can turn to the merits of the Airport's motion.

The Airport's motion for sanctions did not allege that the Brenemans' entire appeal was frivolous; it simply argued that their appeal "as it relates to the Airport is insubstantial and not reasonably calculated to result in a change in the judgment

as to the Airport." As our imposition of a sanction in *Ochoa Realty Corp. v. Faria,* 815 F.2d 812, 817-18 (1st Cir.1987), demonstrates, the Airport did not have to prove that the entire appeal was frivolous in order to justify its request for sanctions. Although the Brenemans forced the Airport to incur significant costs litigating this appeal by naming it as an adverse party in the docketing statement, they failed to explicitly address the district court's dismissal of their claims against the Airport. Despite the Airport's repeated protestations, the Brenemans never explained why they considered the Airport to be an adverse party in this appeal.[9] As we noted in *Ochoa Realty,* "[w]e will not countenance frivolous impositions of this sort upon one's litigation adversaries." *Id.* at 818.

The Airport submitted an affidavit documenting $3,420 in attorney's fees and $445.22 in costs that it incurred defending against the Brenemans' appeal. We have no reason to question the reasonableness of these costs, and the Brenemans have not raised any issue as to reasonableness. Convinced that a sanction of attorney's fees plus costs is required under the circumstances, we award $3,865.22 to the Airport.

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9. The Brenemans argued in their response to the Airport's motion for sanctions that "[t]he Airport is an indispensable party to this action due to its action in conspiring with the Government to convert Appellants' property into 'navigable airspace' and its inconsistent positions with respect to ownership of the Appellants' property." Although the Brenemans alleged conspiracy theories in their complaint, they developed no argument on this issue on appeal. That omission is the critical point for our sanctions analysis.

*Appendix A*

**III.**

We affirm the judgment of the district court. We award attorney's fees and costs totaling $3,865.22 to appellee Tanner Hiller Airport.

***So ordered.***

## APPENDIX B — MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED SEPTEMBER 23, 2003

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

CIVIL ACTION NO. 02-12400-RWZ

JOHN BRENEMAN AND WILLIAM D. BRENEMAN

v.

UNITED STATES, *EX REL.* THE FEDERAL AVIATION ADMINISTRATION, ET AL.

*MEMORANDUM OF DECISION*

September 23, 2003

ZOBEL, J.

Plaintiffs John and William Breneman own property located in New Braintree, Massachusetts, which is adjacent to the privately owned, public use Tanner Hiller Airport ("Airport"). Most of the land is undeveloped. Between May 21, 1986, and October 17, 1988, Airport owner Leonard Tanner ("Tanner") hired A. Amorello & Sons, Inc. ("Amorello") to remove gravel, stone walls, a fence, and a hill from plaintiffs' property in order to extend a runway. Trees were also cleared and waste was buried thereon. Plaintiffs discovered the alterations in August 1991 and slightly more than a year later, commenced the first of a series of legal and administrative actions for redress.

*Appendix B*

On September 25, 1992, plaintiffs filed suit in state court against Tanner who, in turn, impleaded Amorello as a third-party defendant. Two years later, plaintiffs added Amorello as a defendant. Plaintiffs alleged trespass, willful trespass to trees in violation of state law, continuing trespass and damage to the land, conversion, negligence, and unfair and deceptive trade practices. They sought damages, establishment of land boundaries, an order demanding that defendant remove the runway extension, and funds to remove the materials defendants dumped onto plaintiffs' property and to return the land to its original condition. The Worcester Superior Court granted defendant Amorello's Motion to Dismiss on grounds that plaintiffs' claims were barred by the statute of limitations. *Breneman v. Tanner*, No. 922705, 1999 WL 1336436 (Mass. Super. Ct. Feb. 1, 1999). On October 21, 1999, the court allowed defendant Amorello's Motion for Summary Judgment as to Tanner's contribution claim and also allowed defendant Tanner's Motion for Summary Judgment as to all claims (except his counterclaim of adverse possession) because they were time-barred. *Breneman v. Wolfson*,[1] 10 Mass. L. Rptr. 634 (Mass. Super. Ct. 1999). Plaintiffs' appeal is pending. The parties subsequently dismissed the adverse possession claim without prejudice.

Some time in December 1997, plaintiffs reported to the Federal Aviation Administration ("FAA") a discrepancy between runway length as reported by the FAA in the Airport Directory of the Airman's Information Manual and as measured by plaintiffs. The FAA acknowledged the inaccurate runway measurement and apologized to the plaintiffs on behalf of the Commonwealth of Massachusetts

1. John Wolfson is the executor of Leonard Tanner's estate.

Aeronautics Commission ("CMAC"). On May 18, 2000, FAA published the 61st Edition of the New York Sectional Chart, an aeronautical navigation chart for pilots showing the extended runway. Subsequently, plaintiffs filed notices for proposed reconstruction of the fence and hill on their property. On February 15, 2001, FAA issued an Order in Aeronautical Study, which determined that replacement of the hill and fence would be hazardous to air navigation. Soon thereafter, on April 9, 2001, plaintiffs appealed the FAA's dismissal of their petition for review of the Order to the United States Court of Appeals for the District of Columbia Circuit,. In an unpublished opinion, the court determined that the plaintiffs lacked standing to challenge the FAA's advisory opinion concerning the resurrection of the fence. Although the plaintiffs established standing to challenge the FAA's opinion concerning the replacement of the hill, the court found that the determination was not arbitrary and capricious and further, that plaintiffs "ran afoul of this court's chutzpah doctrine when they conceded at oral argument that they *intend* to build the hill in part to impede air traffic at the Airport." *Breneman v. Federal Aviation Administration*, No. 01-1165, Consolidated with 01-1166, 2002 U.S. App. LEXIS 4322, at *7 (D.C. Cir. Feb. 26, 2002). Finally, the court found all of plaintiffs' other constitutional challenges to the FAA's determination concerning the hill to be meritless.

On September 13, 2001, plaintiffs returned to Worcester Superior Court with a petition in equity seeking review of the CMAC's final decision which denied their request to replace the hill on their property. After a hearing on plaintiffs' Motion for Summary Judgment on September 16, 2002, the court took the matter under advisement. According to the

docket sheet submitted by plaintiffs, decision has not yet been rendered. (Pl.'s Response to August 12, 2003 Order at Exh. C.).

Next, plaintiffs filed suit against the United States in the Court of Federal Claims on December 13, 2002, claiming inverse condemnation based on the actions of the FAA. On August 6, 2003, the court denied the government's Motion to Dismiss, but granted its Motion for Summary Judgment, and entered judgment for the United States. The court found the FAA's publication of the New York Sectional Chart recognizing the extension of Tanner's runway and its hazard determinations based on plaintiffs' plans to rebuild the fence and hill did not constitute a Taking under the Fifth Amendment. *Breneman v. The United States*, No. 02-1854 L, 2003 U.S. Claims LEXIS 234 (Fed. Cl. August 6, 2003).

On the same day that they initiated suit in the Court of Federal Claims, plaintiffs filed a seven count Complaint in this Court against the FAA, the CMAC, and the Airport. Plaintiffs claim that the "final orders and regulation of the FAA and CMAC in conjunction with the actions of the Tanner Hiller Airport have appropriated the greater portion of the plaintiffs' property to the public without compensation." (Complaint at 2). They characterize the action as one seeking "an injunction and invalidation of the actions of the FAA [and] CMAC as well as compensation for the temporary use of their property or in the alternative damages and compensation for the inverse condemnation of their property." (Complaint at 4). Each defendant has filed a Motion to Dismiss.

*Appendix B*

Plaintiffs cannot sustain their claims against the Airport. Count I fails because inverse condemnation is a cause of action against a governmental entity and the Airport is privately owned. *United States v. Clark*, 445 U.S. 253, 257, 100 S. Ct. 1127, 1130 (1980). To the extent that plaintiffs are asserting claims against the Airport for trespass or conversion, they are barred by the three-year statute of limitations. Mass. Gen. Laws ch. 260, § 2A (actions of tort and replevin must be commenced within three years after the cause of action accrues).[2] Count II, entitled "Invalidation of Government Action," does not apply to the Airport.

Counts III and IV allege violation of and conspiracy to violate 42 U.S.C. § 1983. Although the typical Section 1983 case is against a state actor, a Section 1983 claim is viable against a private party if the plaintiff can show that the private defendant had an agreement with a state actor to deprive plaintiff of rights. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 151, 90 S. Ct. 1598, 1605 (1970). Here, plaintiffs contend that "[t]he CMAC and the Airport deprived plaintiffs of their property rights in violation of the Fifth Amendment by suppressing or concealing [and conspiring to suppress and conceal] the date(s) and facts surrounding the illegal extension of the runway at the Tanner Hiller Airport." (Complaint at 30). However, the alleged suppression is not a

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2. In deciding plaintiffs' state law claims, the Court exercises its supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a), which states that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

violation of the Fifth Amendment; and, in any case, there is no evidence that the Airport and the CMAC had such an agreement. Furthermore, any concealment was highly unlikely; the Massachusetts Superior Court noted that "while it may not have been easy to initially discover buried tree stumps, a plainly visible gravel hill and many trees were openly leveled, placing the plaintiffs on notice." *Breneman v. Tanner*, No. 922705, 1999 WL 1336436 (Mass. Super. Ct. Feb. 1, 1999).

In Count V, entitled "Use of Property," plaintiffs contend that the Airport used their property without authorization or compensation, but does not specify the grounds on which the claim is brought. If they are alleging a violation of Mass. Gen. Laws ch. 131, § 40, they, as private parties, cannot sue. *Christoffels v. Alton Properties, Inc.*, 285 N.E.2d 453, 454 (Mass. 1972) (stating that Mass. Gen. Laws ch. 131, § 40 "protects only the public interest and confers no enforceable rights on the plaintiffs.").

Count VI alleges that the actions of the defendants "constitute an appropriation and confusion of plaintiffs' property with the Tanner Hiller Airport property by creating the appearance that the approach surfaces, the primary surface of the runway and other parts of Tanner Hiller Airport are part of the [ ] "airport" when in reality this property belongs to the plaintiffs." (Complaint at 33-34.). Again, to the extent that plaintiffs are claiming trespass, their claim is, as noted earlier, barred by the three-year statute of limitations. Finally, plaintiffs' last claim to quiet title to the property and remove the cloud from its title cannot be maintained "unless both actual possession and the legal title are united in the plaintiff."

*Daley v. Daley*, 14 N.E.2d 113, 116 (Mass. 1938). Here, plaintiffs do not have actual possession of the land in controversy—the Airport does. Because plaintiffs cannot prevail on any of their claims against the Airport, the Airport's Motion to Dismiss is allowed.

*Res judicata* bars plaintiffs' claims against the FAA. *Res judicata* is a judicially constructed doctrine based on three policy considerations: (1) avoiding the cost of multiple lawsuits, (2) conserving judicial resources, and (3) preventing inconsistent outcomes. *Bay State HMO Management, Inc. v. Tingley Systems, Inc.*, 181 F.3d 174, 181 (1st Cir. 1999). "The doctrine of *res judicata* bars all parties and their privies from relitigating issues which were raised or *could have been raised* in a previous action, once a court has entered a final judgment on the merits in the previous action." *Aunyx Corp. v. Canon U.S.A., Inc.*, 978 F.2d 3, 6 (1st Cir. 1992). There are two aspects of *res judicata*—claim preclusion and collateral estoppel. *Grella v. Salem Five Cent Savings Bank*, 42 F.3d 26, 30 (1st Cir. 1994). The elements of claim preclusion are: "(1) a final judgment on the merits in an earlier action; (2) an identity of parties or privies in the two suits; and (3) an identity of the cause of action in both suits." *Id.* The entry of a final judgment on the merits extinguishes plaintiffs' rights to pursue remedies as to the whole or part of the transaction at issue in the complaint. *Isaac v. Schwartz*, 706 F.2d 15, 16 (1st Cir. 1983).

Plaintiffs have already appealed the FAA's decision to the D.C. Circuit and brought the same claims against the United States in the Court of Federal Claims resulting in

judgment for the defendant.[3] Here, for the third time, plaintiffs are seeking to invalidate the FAA's determinations. Plaintiffs cannot continue to file lawsuits until they obtain the result they seek.

Finally, CMAC contends that plaintiffs' suit against it is barred by the Eleventh Amendment. "It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State School & Hospital v. Halderman*, 104 S. Ct. 900, 908, 465 U.S. 89, 100 (1984). This is true regardless of the nature of the relief sought. *Id.* In their Complaint, plaintiffs state that defendant CMAC "is an administrative agency of the Commonwealth of Massachusetts and acts for the Commonwealth of Massachusetts." (Complaint at 6). Because defendant CMAC has not consented to suit, plaintiffs' claims must be dismissed.

Accordingly, the Motions to Dismiss by the Airport, the FAA, and the CMAC are ALLOWED. Judgment may be entered dismissing the complaint with prejudice.

DATE

RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

3. The parties are the same in the two suits as recognized by plaintiffs in their Complaint: "[t]he defendant, FAA, is an administrative agency of the United States and acts for the United States." (Complaint at 6.).

**APPENDIX C — STIPULATION OF DISMISSAL ENTERED IN WCV 1992-2705 ENTERED ON APRIL 2, 2001**

**COMMONWEALTH OF MASSACHUSETTS**

WORCESTER, SS.

SUPERIOR COURT DEPARTMENT
of the TRIAL COURT
DOCKET NO. 92-2705

WILLIAM D. BRENEMAN and JOHN BRENEMAN

Plaintiffs

vs.

JOHN M. WOLFSON, EXECUTOR OF THE ESTATE OF LEONARD TANNER

**STIPULATION OF DISMISSAL WITHOUT PREJUDICE**

Now come the parties in the above-entitled matter and hereby stipulate to the dismissal as to the **Counterclaim for Adverse Possession** only, without prejudice.

*Appendix C*

RESPECTFULLY SUBMITTED,

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and John Breneman,
By Their Attorney,

s/ James C. Donnelly
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By His Attorney,

s/ Richard T. Tucker
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## APPENDIX D — CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

### United States Constitution

### Article I

**Section 8.** The Congress shall have Power. . . ; To constitute Tribunals inferior to the supreme Court;

* * * *

### United States Constitution

### Article III

**Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

* * *

**Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another

State; - between citizens of different States; - between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * *

**Title 49 United States Code, Section 40102(30)**

'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft.

**Title 49 United States Code, Section 40103(a)(1) and (a)(2)**

(a) Sovereignty and Public Right of Transit. –

(1) The United States Government has exclusive sovereignty of airspace of the United States.

(2) A citizen of the United States has a public right of transit through the navigable airspace.

*Appendix D*

**Title 49 United States Code, Section 46301(a)**

CIVIL PENALTIES

(a) **General penalty.** (1) A person is liable to the United States Government for a civil penalty of not more than $1,000 for violating-

(A) chapter 401 [49 USCS §§ 40101 et seq.] (except sections 40103(a) and (d), 40105, 40116, and 40117), chapter 411 [49 USCS §§ 41101 et seq.], chapter 413 (except sections 41307 and 41310(b)-(f)), chapter 415 (except sections 41502, 41505, and 41507-41509), chapter 417 (except sections 41703, 41704, 41710, 41713, and 41714), chapter 419 [49 USCS §§ 41901 et seq.], subchapter II or III of chapter 421 [49 USCS §§ 42111 et seq. or 42121], chapter 441 [49 USCS §§ 41101 et seq.] (except section 44109), 44502(b) or (c), chapter 447 (except sections 44717 and 44719-44723), chapter 449 (except sections 44902, 44903(d), 44904, 44907(a)-(d)(1)(A) and (d)(1)(C)-(f), and 44908), or section 47107(b) (including any assurance made under such section) of this title;

(B) a regulation prescribed or order issued under any provision to which clause (A) of this paragraph applies;

(C) any term of certificate or permit issued under section 41102, 41103 or 41302 of this title; or

(D) a regulation of the United States Postal Service under this part [49 USCS §§40101 et seq.].

(2) A person operating an aircraft for the transportation of passengers or property for compensation (except an airman serving as an airman) is liable to the Government for a civil penalty of not more than $10,000 for violating-

(3) A civil penalty of not more than $10,000 may be imposed for each violation under paragraph (1) of this subsection related to-

(A) the transportation of hazardous material;

(B) the registration or recordation under chapter of 441 of this title [49 USCS §§ 44101 et seq.] of an aircraft not used to provide air transportation;

(C) a violation of section 44718(d), relating to the limitation on construction or establishment of landfills;

(D) a violation of section 44725, relating to the safe disposal of life-limited aircraft parts; or

(E) a violation of section 41705, relating to discrimination against handicapped individuals.

* * * *

*Appendix D*

**Title 49 United States Code, Section 46316 General criminal penalty when specific penalty not provided**

(a) **Criminal penalty**. Except as provided by subsection(b) of this section, when another criminal penalty is not provided under this chapter [49 USCS §§ 46301 et seq.], a person that knowingly and willfully violates this part [49 USCS §§ 40101 et seq.], a regulation prescribed or order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation safety duties and powers designated to be carried out by the Administrator) under this part [49 USCS §§ 40101 et seq.], or any term of a certificate or permit issued under section 41102, 41103, or 41302 of this title shall be fined under title 18. A separate violation occurs for each day the violation continues.

(b) **Nonapplication**. Subsection (a) of this section does not apply to chapter 401 [49 USCS §§ 40101 et seq.] (except sections 40103(a) and (d), 40105, 40116, and 40117), chapter 441 [49 USCS §§ 44101 et seq.] (except section 44109), chapter 445 [49 USCS §§ 44501 et seq.], chapter 447 [49 USCS §§ 44701 et seq.] (except section 44718(a)), and chapter 449 [49 USCS §§ 44901 et seq.] (except sections 44902, 44903(d), 44904, and 44907-44909) of this title.

*Appendix D*

**Title 49 United States Code, Section 44718**

Structures interfering with air commerce

(a) Notice. - By regulation or by order when necessary, the Secretary of Transportation shall require a person to give adequate public notice, in the form and way the Secretary prescribes, of the construction, alteration, establishment, or expansion, or the proposed construction, alteration, establishment, or expansion, of a structure or sanitary landfill when the notice will promote -

(1) safety in air commerce; and

(2) the efficient use and preservation of the navigable airspace and of airport traffic capacity at public-use airports.

(b) Studies. - (1) Under regulations prescribed by the Secretary, if the Secretary decides that constructing or altering a structure may result in an obstruction of the navigable airspace or an interference with air navigation facilities and equipment or the navigable airspace, the Secretary shall conduct an aeronautical study to decide the extent of any adverse impact on the safe and efficient use of the airspace, facilities, or equipment. In conducting the study, the Secretary shall consider factors relevant to the efficient and effective use of the navigable airspace, including -

(A) the impact on arrival, departure, and en route procedures for aircraft operating under visual flight rules;

(B) the impact on arrival, departure, and en route procedures for aircraft operating under instrument flight rules;

(C) the impact on existing public-use airports and aeronautical facilities;

(D) the impact on planned public-use airports and aeronautical facilities; and

(E) the cumulative impact resulting from the proposed construction or alteration of a structure when combined with the impact of other existing or proposed structures.

(2) On completing the study, the Secretary shall issue a report disclosing completely the extent of the adverse impact on the safe and efficient use of the navigable airspace that the Secretary finds will result from constructing or altering the structure.

(c) Broadcast Applications and Tower Studies. - In carrying out laws related to a broadcast application and conducting an aeronautical study related to broadcast towers, the Administrator of the Federal Aviation Administration and the Federal Communications Commission shall take action necessary to coordinate efficiently -

(1) the receipt and consideration of, and action on, the application; and

(2) the completion of any associated aeronautical study.

(d) Limitation on Construction of Landfills. –

(1) In general. - No person shall construct or establish a municipal solid waste landfill (as defined in section 258.2 of title 40, Code of Federal Regulations, as in effect on the date of the enactment of this subsection) that receives putrescible waste (as defined in section 257.3-8 of such title) within 6 miles of a public airport that has received grants under chapter 471 and is primarily served by general aviation aircraft and regularly scheduled flights of aircraft designed for 60 passengers or less unless the State aviation agency of the State in which the airport is located requests that the Administrator of the Federal Aviation Administration exempt the landfill from the application of this subsection and the Administrator determines that such exemption would have no adverse impact on aviation safety.

(2) Limitation on applicability. – Paragraph (1) shall not apply in the State of Alaska and shall not apply to the construction, establishment, expansion, or modification of,

or to any other activity undertaken with respect to, a municipal solid waste landfill if the construction or establishment of the landfill was commenced on or before the date of the enactment of this subsection.

**Title 28 United States Code, Section 2409a. Real property quiet title actions**

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment

to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

* * *

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

*Appendix D*

**Title 28 United States Code, Section 1346.**
**United States as defendant**

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

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*Appendix D*

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

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**Massachusetts General Laws Chapter 90 Section 35B**

Approach Protection

No person shall erect or add to the height of any structure within a rectangular area lying fifteen hundred feet on either side of the extended center line of a runway or landing strip of an airport approved by the commission for a distance of two miles from the end of such runway or landing strip so that the height thereof will be more than one hundred and fifty feet above the level of such runway or landing strip, nor, within that portion of such area which is within a distance of three thousand feet from the end of such runway or landing strip, so that the height thereof will be greater than a height above the level of such runway or landing strip determined by the ratio of one foot vertically to every twenty feet horizontally measured from the end of such runway or landing strip, unless a permit therefor has been granted by the commission.

*Appendix D*

The provisions of this section shall not apply (1) to areas subject to airport approach regulations adopted pursuant to sections forty A to forty I, inclusive, (2) to air approaches to the General Edward Lawrence Logan International Airport, nor (3) to structures which will be thirty feet or less in height above ground.

**Massachusetts General Laws Chapter 90 Section 44**

Penalties

Any person failing to comply with any requirement, or violating any provision, of sections thirty-five to fifty-two, inclusive, or the rules and regulations for the enforcement of said sections made by the commission, or airport approach regulations made by a city or town under section forty A, and in full force and effect, shall be punished by a fine of not less than ten nor more than five hundred dollars, or by imprisonment for not less than one month nor more than six months, or both. Whoever operates an aircraft while under the influence of intoxicating liquor shall be punished by imprisonment for not less than one month nor more than two years.

*Appendix D*

**Airport Design Advisory Circular 150/5300-13**
(6) *4 CFR Part 77 Obstructions to Air Navigation.*

Obstructions to air navigation must be removed unless an FAA aeronautical study, based on proposed operations, determined otherwise . . .